



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

PETITION NO. 11 OF 2015

SAMSON GETOBAI MAROA

JOHN KIMWAMA MOHOCHI.....PETITIONERS

AND

THE MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT.....1st RESPONDENT

THE MINISTRY OF EDUCATION,

SCIENCE & TECHNOLOGY.....2nd RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS.....3rd RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4th RESPONDENT

AND

BUGUMBE COUNCIL OF ELDERS.....INTERESTED PARTY/APPLICANT

RULING NO. 2

1. On 29/06/2017 this Court rendered a ruling and referred the dispute to the Migori County Education Board (hereinafter referred to as '**the Board**') and a decision was to be filed by 30/09/2017.
2. As the decision of the Board was pending an evenly dated Notice of Motion was filed on 26/03/2018. The application was supported by the affidavit of **Joseph Ikaari** sworn on the same date and on behalf of the Bugumbe Clan of the Kuria Community (hereinafter referred to as '**the Clan**'). The application sought the enjoinder of the Bugumbe Council of Elders (hereinafter referred to as '**the Council**' or '**the Applicant**') as an Interested Party in the Petition.
3. The application was opposed by the Petitioners on several grounds including that the Council/Applicant had no *locus standi* in the matter and that it stood not to add any value to the matter rather than delaying its early finalization.
4. **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013** (hereinafter referred to as '**the Rules**') defines an '*interested party*' as: -

'a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'

5. The Applicant described itself as '*the custodians of the interests of the Bugumbe Clan*' and contended that since the Clan has been named in the Petition then it is only fair and just that it be enjoined to canvass and ventilate its position and view as the Petition revolves around inter-clan issues of the Kuria Community and that unless the Council is enjoined it risks being condemned unheard. That, the application was made in good faith.

6. As to whether the Applicant is seized of the requisite *locus standi* I will reproduce a discussion I had on the very subject in Kakamega High Court Constitutional Petition No. 1 of 2015 Gerishom L. Majanja vs. Wycliffe Oparanya & Another (2015) eKLR where I stated as follows: -

‘8. Article 258 of the Constitution states as follows: -

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members. (emphasis added).

9. The issue of *locus standi* is now well settled in our jurisprudence. *The Court of Appeal at Nairobi in Civil Appeal No. 290 of 2012* consisting of a 5-Judge Bench of Honourable Justices Kihara Kariuki (PCA), Ouko, Kiage, Gatembu-Kairu and Murgor reported as Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR in dealing with an argument that the Respondent, an NGO (Trusted Society of Human Rights Alliance) whose mandate includes the pursuit of constitutionalism lacked *locus standi* to challenge the appointment of Mumo Matemu as the Chair of the Ethics and Anti-Corporation Commission, firmly stated as follows: -

“26. It is hard to maintain the argument that the first respondent did not suffer any injury to warrant this standing to lodge the Petition before the High Court. It is equally hard to maintain the position that the first Respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethics and Anti-Corruption Commission.

27. Moreso, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes pursuit of constitutionalism and we therefore reject the arguments of lack of standing by Counsel for the Appellant. We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the *locus standi* to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.....

28. It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013.....“the Mutunga Rules” to inter alia, facilitate the application of the right of standing.....The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the Constitution.

29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.

30. It is in consideration that in filing the Petition the 1st Respondent was acting not only on behalf of the members and in accordance with the stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st Respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.”

The above position has been so taken up the Courts even before the promulgation of the Constitution. (See the cases of Shah Vershi Devji & Co Ltd vs. The Transport Licensing Board Nairobi HCMC No. 89 of 1969 (1970) EA 631; (1971) EA 289 and that of Muruthi Attorney Geward & 5 others Nairobi HCMCA No. 158 of 2005 (2006) 1 KLR 443).

10. In view of the foregone analysis and considering the nature of the Petition before Court, this Court holds that the Petitioner has requisite locus standi to institute the said proceedings and since there is no evidence that the Petition has been brought in bad-faith, the Court further holds that the cause of action at hand ought to be determined on its merit.'

7. Whereas the foregone dealt with the locus standi in respect to a party filing a Petition, the analysis remain relevant to a case where an interested party claims to have some identifiable stake or legal interest in a matter. The stake or interest by the Applicant in this matter is that the Clan stands to be condemned unheard on matters that affect its welfare.

8. On perusal of the Petition and the evidence of the First Petitioner herein which was adduced during the hearing, it stands out that the dispute relates to how the Bukira Clan and the Clan have related over time in respect to *inter alia* the administration of the schools in issue. That is also clear on how the Petitioners tailored the heading of the Petition as '**In the matter of the Bukira and Bugumbe Clans**'. The Petitioners cannot hence be right in contending that the Clan has nothing meaningful to add to the matter. On the same footing the Council remains the appropriate forum to ventilate the position of the Clan in the matter.

9. The application is merited. The Applicant shall participate in the Petition as an Interested Party upon directions to be issued. Costs of the application in cause.

10. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of August 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open court and in the presence of: -

Mr. Omonde Kisera instructed by the firm of Omonde Kisera & Co. Advocates for the Applicants.

Miss Mireri instructed by the firm of Oguttu-Mboya & Company Advocates for the Respondents.

Evelyne Nyauke – Court Assistant